

1 Cristina C. Arguedas (CalBN 87787) Allen J. Ruby (CalBN 47109)
2 Email: arguedas@achlaw.com Email: allen.ruby@skadden.com
3 Ted W. Cassman (CalBN 98932) Jack P. DiCanio (CalBN 138782)
4 Email: cassman@achlaw.com Email: jack.dicarlo@skadden.com
5 Raphael M. Goldman (CalBN 229261) Patrick Hammon (CalBN 255047)
6 Email: goldman@achlaw.com Email: patrick.hammon@skadden.com
7 ARGUEDAS, CASSMAN & HEADLEY, LLP SKADDEN, ARPS, SLATE, MEAGHER
8 803 Hearst Avenue & FLOM LLP
Berkeley, CA 94710 525 University Avenue, Suite 1100
Telephone: (510) 845-3000 Palo Alto, CA 94301
Facsimile: (510) 845-3003 Telephone: (650) 470-4500
Facsimile: (650) 470-4570

9 *Counsel for FedEx Corporation,*
10 *Federal Express Corporation and*
FedEx Corporate Services, Inc.

11 UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14) **No. CR 14-380 (CRB)**
15 UNITED STATES OF AMERICA,)
16 Plaintiff,) **FEDEX DEFENDANTS' MOTION TO**
17) **CONTINUE THE DATE FOR TRIAL**
18 v.) Date: August 19, 2015
19 FEDEX CORPORATION, FEDERAL) Time: 10:00 a.m.
20 EXPRESS CORPORATION, and FEDEX) Hon. Charles R. Breyer
21 CORPORATE SERVICES, INC.,)
22 Defendants.)
23
24
25
26
27
28

1 Defendants FedEx Corporation, Federal Express Corporation and FedEx
2 Corporate Services, Inc. (collectively, "FedEx") respectfully — and reluctantly — seek
3 an order continuing the date for trial in this matter until September 12, 2016. The
4 continuance is necessary to vindicate FedEx's Sixth Amendment rights to compel
5 evidence and prepare its defense.

6
7 The parties previously stipulated to, and the Court approved, an "aggressive"
8 pre-trial and trial schedule that called for the trial to begin February 29, 2016, with final
9 pretrial motions to be filed on September 9, 2015 and heard November 4, 2015. See
10 Dkt. #68 (scheduling order) & #69 (transcript of January 21, 2015 hearing). Since that
11 time, FedEx requested and the Court issued pursuant to Federal Rule of Criminal
12 Procedure 17(c) a number of subpoenas *duces tecum* to various federal and state law
13 enforcement agencies. Dkt. #81, 85, 98, 105. The subpoenas are designed to obtain
14 evidence that will be crucial to FedEx's defense by showing its good-faith cooperation
15 with law enforcement efforts throughout the period covered by the charges in the
16 indictment. See Dkt. #88 & 96.

17
18 Most of the Rule 17(c) subpoenas were issued by the Clerk of the Court on May
19, 2015, and called for compliance by June 15, 2015. Declaration of Cristina C.
20 Arguedas in Support of Motion to Continue Trial ("Arguedas Decl.") ¶ 3. FedEx served
21 the subpoenas on the various agencies, and since that time FedEx counsel has
22 communicated on a regular basis with counsel for the subpoenaed agencies about the
23 contours of the agencies' searches through their files for responsive records. *Id.* ¶¶ 4-5.
24 FedEx has agreed to periodic extensions of the dates for compliance with the
25 subpoenas to accommodate the parties' continuing discussions and the agencies'
26
27
28

1 ongoing efforts to identify responsive records. *Id.* ¶ 6.

2 As discussed in more detail in counsel's accompanying declaration, a number of
3 agencies, including each of the subpoenaed federal agencies, have explained that the
4 searches called for by the subpoenas will take at least several more months to
5 complete. Arguedas Decl. ¶ 7. These explanations appear reasonable and credible;
6 the delays arise not from recalcitrance or the agencies' attempts to evade their
7 obligations, but from the fact that — due to the breadth of the charges in the
8 superseding indictment in this case — the subpoenas by necessity ask the law
9 enforcement agencies to dig into records created, in some instances, more than a
10 decade ago. *Id.* ¶¶ 7-8. Thus, for example, one of the agencies will need to undertake
11 the time-consuming process of converting old email files into a type that is readable
12 using today's technology, *id.* ¶ 7(c), and another is exploring options for searching email
13 records stored pursuant to a "disaster recovery" protocol, *id.* ¶ 7(d). Each of the federal
14 agencies subpoenaed by FedEx, as well as the Florida Department of Law
15 Enforcement, has expressed that their records searches will likely take at least until the
16 middle of September to complete; several of the agencies' searches will take
17 substantially longer. *Id.* ¶ 7(a)-(e). Other state and local agencies are in the process of
18 searching their records; some may complete the process before September, but others
19 likely will not. *Id.* ¶ 7(f).

20 Additionally, the federal agencies have expressed that, once their records
21 searches are complete, they may assert privileges and refuse to produce certain
22 records that are otherwise responsive to the subpoenas. *Id.* ¶ 9. It is difficult to
23 anticipate the shape of any dispute at this point, but the agencies' statements do raise
24

1 the specter of litigation over the agencies' privilege claims. In sum, especially taking
 2 account of the inevitable delays and potential privilege litigation, the process of
 3 obtaining and analyzing all the records to which FedEx is entitled under the Court's
 4 rulings appears likely to continue well into 2016.
 5

6 Finally, leaving aside the subpoenaed agencies, the prosecution in this matter is
 7 still producing substantial quantities of discovery to the defense. On July 22, 2015, the
 8 prosecution produced to FedEx more than 11 gigabytes of data, which included more
 9 than 165,837 pages of documentary records, among other items. *Id.* ¶ 10. FedEx
 10 understands that additional discovery still remains to be produced. *Id.*
 11

12 The present schedule calls for FedEx to file its final pretrial motions on
 13 September 9, 2015, to file motions *in limine* in January 2016, and to begin trial at the
 14 end of February. Docket #68. It cannot be overstated how eager FedEx is to begin the
 15 trial and to defend its good name. But, as further discussed in the accompanying
 16 Supplemental Declaration of Cristina C. Arguedas, filed *in camera* and under seal, the
 17 subpoenaed records are vital defense evidence. It would be unfair — and a violation of
 18 FedEx's Sixth Amendment rights to compel evidence and prepare its defense — to
 19 force FedEx to file its final motions and go to trial without having obtained records that
 20 will support its defenses and answer the Court's questions: "What did FedEx know?
 21 What were they told? What did they do? What did they say?" See Dkt. #53 (9/25/2014
 22 Tx) at 5:8-12 & 22-24; see also Dkt. #69 (1/21/2015 Tx) at 8:20-23, 9:24-10:3, 11:20-
 23 12:16; Dkt. #85 (2/20/2015 Tx) at 11:3-8.
 24

25 FedEx requests that the Court continue the date for trial until September 12,
 26 2016, and that the pretrial schedule previously entered by the Court, see Dkt. #68, be
 27
 28

1 amended as follows:

2

3 Expert Disclosures

4 October 14, 2015 Rebuttal expert disclosures are due

5

6 Grand Jury Disclosures

7 June 8, 2016 Remaining grand jury transcripts from the Northern District of
8 California to be disclosed

9

10 Motions Round #3

11 April 6, 2016 Motions Round #3 – opening briefs are due

12 May 4, 2016 Motions Round #3 – responsive briefs are due

13 May 18, 2016 Motions Round #3 – reply briefs are due

14 June 1, 2016 Hearing on Motions Round #3

15

16 Pretrial and Trial

17 June 8, 2016 Rule 404(b) notice is due

18 June 8, 2016 Prosecution witness list is due

19 June 22, 2016 Defense witness list is due

20 July 27, 2016 Motions in Limine are due

21 August 10, 2016 Motions in Limine oppositions are due

22 August 24, 2016 Motions in Limine replies are due

23 August 24, 2016 Pretrial filings are due

24 August 31, 2016 Pretrial conference

1 September 12, 2016 Jury selection

2 September 14, 2016 Opening statements

3 //

4 Dated: August 7, 2015

5 Respectfully submitted,

6 ARGUEDAS, CASSMAN & HEADLEY, LLP

7 By: _____ /s/

8 Cristina C. Arguedas
9 803 Hearst Avenue
10 Berkeley, CA 94710
11 (510) 845-3000

12 Counsel for FedEx Corporation,
13 Federal Express Corporation and
14 FedEx Corporate Services, Inc.